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PD-0706-16

FILED  
COURT OF CRIMINAL APPEALS  
12/30/2016  
ABEL ACOSTA, CLERK

**IN THE  
COURT OF CRIMINAL APPEALS  
STATE OF TEXAS at Austin**

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**THE STATE OF TEXAS,  
Appellant**

**v.**

**GORDON HEATH ELROD,  
Appellee**

\*\*\*\*\*

On Appeal from the Court of Appeals  
Fifth District  
at Dallas

CAUSE NO. 05-15-01219-CR  
CAUSE NO. 05-15-01221-CR  
CAUSE NO. 05-15-01222-CR

\*\*\*\*\*

**BRIEF OF APPELLEE**

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v.  
GORDON HEATH ELROD,  
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***TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:***

**COMES NOW** Gordon Heath Elrod, Appellee herein, and respectfully submits this his brief in response to the State's brief filed upon the granting of the State's Petition for Discretionary Review. These cases are pending in the Court of Appeals for the Fifth District of Texas at Dallas.

**SUMMARY OF THE ARGUMENT**

The search warrant issued in this cause was not supported by an affidavit that presented probable cause. The information supplied in the affidavit did not establish that a crime was being committed or that evidence of criminal activity would be found at the premises to be searched. The Motion to Suppress was properly granted.

## ARGUMENT

### RESPONSE TO ISSUE NO. I

#### **THE DISTRICT COURT DID NOT COMMIT ERROR IN GRANTING APPELLEE'S MOTION TO SUPPRESS BECAUSE THE MAGISTRATE DID NOT PROPERLY FIND PROBABLE CAUSE WITHIN THE FOUR CORNERS OF THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT**

In assessing the sufficiency of a search warrant, the reviewing court is limited to the four corners of the affidavit which supports it. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011); *Glaze v. State*, 230 S.W.3d 258, 260 (Tex. App. - Waco 2007). Because there is a constitutional preference for warrants rather than searches without warrant, the reviewing court will apply a highly deferential standard in reviewing a magistrate's decision to issue a warrant. *Illinois v. Gates*, 462 U.S. 213, 234–37, 103 S.Ct. 2317, 2330–31, 76 L.Ed.2d 527 (1983); *McLain*, 337 S.W.3d at 271. As long as the magistrate had a “substantial basis” for concluding that probable cause existed, the magistrate's probable cause determination will be upheld on appeal. *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331; *McLain*, 337 S.W.3d at 271. The affidavit should not be scrutinized in an hyper-technical way. *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331; *McLain*, 337 S.W.3d at 271. Instead, the reviewing court should interpret the affidavit in a common-sense and realistic manner, recognizing

that the magistrate was allowed to draw reasonable inferences from the allegations in the affidavit. *McLain*, 337 S.W.3d at 271; *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App.2007).

Probable cause is presented in an affidavit when, under the totality of the circumstances of the evidentiary claims made in the affidavit, there is a fair probability that contraband or evidence of a crime will be found at the specified location. *McLain*, 337 S.W.3d at 272. The focus in reviewing the affidavit is not on what other facts could or should have been included in the affidavit; the focus is on the combined logical force of facts that are in the affidavit. *State v. Duarte*, 389 S.W.3d 349, 354–55 (Tex. Crim. App. 2012).

In the instant cause the affidavit under scrutiny is contained in volume Five of the Reporter's Record labeled as Defense Exhibit No. 1. A review of the affidavit, under recognized standards, does not establish that probable cause existed to justify the issuance of a search warrant. The affidavit tells a story but not a story that establishes probable cause to justify the issuance of a warrant.

On April 25, 2015 a woman, later identified as Marsha Stovall, tried to cash a check at the One Star Food Mart. The check was a payroll check from America Family Dental. The store clerk refused to cash the check. There is no indication of police involvement at that time.

Two days later, on April 27, 2015 the police were summoned to the same location on a possible forgery situation. When the police arrived the clerk pointed out a car and men who were possibly involved. The police followed the car and, although the people in the car dispersed, they were eventually apprehended. Two of the men were released with no charges being filed. There is a statement that these two men had been involved in the forgery offense but the affidavit does not purport to explain why or how the police reached that conclusion. The third man admitted to being the driver of the car. He told the police that Stovall had asked him for a ride to cash a check and that he was to be paid for this service. He was held in custody on outstanding warrants but, like the other two men, he was not charged with being involved with a forgery.

While these events transpired, other officers were summoned to the same One Star Food location because the woman, Stovall, who had tried to pass a check, was still on the premises. When the officers arrived she was placed in custody. It was determined that the check she was attempting to cash was indeed forged. A search of her purse revealed many other items which could have been used to commit the offense of forgery.

Later that same day, in the evening, two police officers had “contact” with appellee. Why and in what manner are not explained. The “contact” occurred at the

premises later searched by the police under the complained of search warrant. The officers were able to see computers and printers in the room. Even with these observations, appellee was not arrested and no implements of criminality were seized. Apparently, the police did not believe that they had personally observed a crime.

The next day Stovall was interviewed by the police. She told the police that for the past few days she had been staying in room 119 of the Executive Inn. She said that the forged instruments in her possession had been printed in that room. She didn't say when or by whom. According to Stovall there were two computers and four printers in the room she occupied with appellee, his wife and two children. Stovall accused appellee and his wife of being "mail thieves" but she did not give the basis for this conclusion.

Under appropriate review, this affidavit does not provide probable cause to believe that contraband was located at the premises to be searched. According to Stovall, when she left the room at 5:00 p.m, appellee and his wife were in the process of printing counterfeit checks. But two hours later, at 7:00 p.m. the police were in that same room and they saw no illegal activity. Stovall did not state her factual basis for claiming that appellee and his wife were "mail thieves." She did not provide any basis for her belief that there was stolen mail in the room. The district court properly determined that the Motion to Suppress should be granted.



## **PRAYER FOR RELIEF**

**WHEREFORE, FOR THE FOREGOING REASONS,** Appellee prays that this Honorable Court affirm the holding of the Court of Appeals for the Fifth District at Texas which had affirmed the action of the district court in ordering suppression of evidence seized illegally because the affidavit in support of the search warrant did not provide probable cause.

**Respectfully submitted,**

**/S/ Lawrence B. Mitchell**

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## **CERTIFICATE OF WORD-COUNT COMPLIANCE**

The undersigned attorney hereby certifies, in compliance with **TEX. R. APP. PROC. 9.4 (i) (B) (2)** that this document contains 1134 words, including all contents except for the sections of the brief permitted to be excluded by **TEX. R. APP. PROC. 9.4 (i) (1)**.

/s/ Lawrence B. Mitchell  
**LAWRENCE B. MITCHELL**

## **CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that a true and correct copy of the foregoing brief is being served on the attorney representing the State of Texas, Lori Ordiway by e-mail at [lori.ordiway@dallascounty.org](mailto:lori.ordiway@dallascounty.org) and Lisa C. McMinn as State Prosecutin attorney by e-mail as [information@spa.texas.gov](mailto:information@spa.texas.gov) on this the 25<sup>th</sup> day of December, 2016.

/s/ Lawrence B. Mitchell  
**LAWRENCE B. MITCHELL**